86-452

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

C. K. DIXON, JR. - - - - - Petitioner

versus

FEDERAL DEPOSIT INSURANCE CORPORATION - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a Federal District Judge may, *sua sponte,* make and grant a motion for judgment n.o.v. pursuant to Fed. R. Civ. P. (50b).

II. Whether a Federal District Judge may grant a motion for judgment notwithstanding the verdict, pursuant to Fed. R. Civ. P. 50(b) on a ground which is not stated in the party's motion for directed verdict.

III. Whether the Court of Appeals of the Sixth Circuit erroneously applied 12 U.S.C. § 1823(e) in affirming the decision of District Court for the Eastern District of Kentucky in vacating the jury's verdict for petitioner.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the Court whose judgment is sought to be reviewed are named in the Caption of this Petition as filed in this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No.

C. K. DIXON, JR. - - - - - *Petitioner*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is printed in Appendix A hereto, *infra,* page 1a. The judgments of the District Court for the Eastern District of Kentucky are printed in Appendix A hereto, *infra,* pages 12a through 18a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (Appendix A, *infra,* page 1a) was entered on April 29, 1986. A timely petition for rehearing was denied on June 23, 1986 (Appendix A, *infra,* page 11a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

RULES:

Fed. R. Civ. P. 50(a) Motion for Directed Verdict: When Made: Effect.

> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

Fed. R. Civ. P. 50(b) Motion for Judgment Notwithstanding the Verdict.

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

> A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATUTE:

12 U.S.C. § 1823(e):

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation [the F.D.I.C.] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

STATEMENT OF THE CASE

This action involves the enforcement of a promissory note executed by Dixon and others and held by the

Mission State Bank and Trust Company of Mission, Kansas ("Mission State Bank"). Following the failure of the bank, the note was acquired by the FDIC which sought to enforce the note. Federal jurisdiction was invoked in district court pursuant to 12 U.S.C. § 1819 and 28 U.S.C. § 1345. Following a trial on this matter, the jury found that Dixon and the others were not obligated on the note. The trial judge then, *sua sponte,* entered judgment notwithstanding the verdict against all defendants. The circumstances giving rise to this action are as follows:

On February 24, 1978, the principal owners of a Kentucky corporation known as Red Chief Coal, Inc. ("Red Chief") obtained a loan on behalf of Red Chief with the Mission State Bank and Trust Company of Mission, Kansas, in the sum of $272,500.00. This loan was collateralized by heavy equipment used in Red Chief's business of coal mining. Additionally, the owners were accommodation parties on the note.

The owners of Red Chief were Albert Kincer, G. C. Kincer, Richard Kincer, all brothers, and Dr. C. K. Dixon, Jr. The location of Red Chief's mining operation was in Eastern Kentucky. The Kincers operated the mining concern actively while Dixon practiced medicine in Louisville, Kentucky, and did not participate in the day-to-day operations with the brothers.

The loan obligation fell in arrears and the bank sent its representative, Robert G. Koester, to Kentucky for a meeting with the owners of Red Chief. The meeting was held in Winchester, Kentucky in the early part

of 1980. The purpose of the meeting was to determine what Red Chief and its owners (all of whom were present) intended to do about the indebtedness owed the bank. Also present were principals of a company known as Nap Coal. According to Dixon, Koester was to assist in getting something done to relieve Red Chief and its principals of their obligation to the bank.

When the meeting in Winchester concluded Dixon believed that a new obligor, Nap Coal, existed for the bank's indebtedness which would relieve him. Dixon later learned that the new, potential obligor did not satisfy the requirements of the bank and this particular substitution did not come about.

Without Dixon's knowledge, on June 17, 1980, and following the Winchester meeting, the Kincers produced another potential buyer for the equipment and introduced the bank and its official, Koester, to Rodney Taylor. Taylor was the principal officer of a company known as the Bluston Mining Company. Koester, the Kincers, and Taylor met in the offices of the bank's attorneys the firm of Greenebaum, Doll & McDonald in Lexington, Kentucky.

At the meeting held on June 17, 1980, the Kincers, Koester, and Taylor reached an agreement. The agreement was entered into by the Kincers and Taylor on behalf of themselves and the companies they owned. Dixon was not present at the meeting, nor did he sign any of the documents drawn up by the Greenebaum law firm. Dixon testified he did not know the meeting had taken place.

At the time of the meeting at the Greenebaum law firm there remained outstanding on the Red Chief obligation incurred in February 1978 the approximate sum of $259,451.56. Taylor offered to purchase the equipment on behalf of Bluston from Red Chief for the sum of $240,000.00. This left a balance of $19,451.56, representing a difference between Taylor's offer to purchase the equipment, and what remained due and owing on the original obligation. The Greenebaum law firm prepared separate promissory notes in the approximate amount of $4,862.00 each which was intended to reflect the several, separate obligations of the four principals of Red Chief.

Other documents and papers were prepared by the Greenebaum law firm to facilitate the transfer of the collateral, that is the mining equipment, to Bluston and Taylor. These documents included financing statements, loan assumption agreements and guarantees. As part of the consideration for the assumption by Bluston and Taylor of $240,000.00 of the Red Chief indebtedness, the Red Chief owners were to obligate themselves to guarantee the Bluston and Taylor obligation.

In their amended answer and at the trial, the issue of fraud was raised by the Kincers. The claim of fraud emanated from statements allegedly made by Koester to the Kincers that if they would assist the bank in allowing a new purchaser (Bluston and Taylor) to purchase and take possession of the equipment, then the documentation prepared by the Greenebaum law firm, and offered the Kincers for their signatures, the individual notes of some $4,800.00 each, and the Kin-

cers' guarantee of the Bluston and Taylor obligation would be ignored by the bank. The Kincers claimed they relied on Koester's representations and therefore agreed to execute all the necessary documents in the Greenebaum law firm on June 17 to effect the transfer and assumption by Bluston and Taylor.

Dixon, who was recuperating from a serious illness, *was not informed* of the events subsequent to the Winchester meeting. Therefore, Dixon signed none of the assumption papers or agreements. Dixon had *no* contact whatsoever with Bluston and Taylor, nor did he have any further dealings with Koester after the meeting with Winchester.

After the June 17 closing at the Greenebaum law firm, the collateral was turned over to Bluston and Taylor; it was then transported outside the Commonwealth of Kentucky to Virginia and was used by Bluston and Taylor for approximately two years. Bluston and Taylor made only a few payments on the indebtedness.

On August 8, 1980, approximately six weeks after the meeting in the Greenebaum law firm, the Mission State Bank failed and the state court receiver called upon the FDIC to assume and handle the affairs of the bank.

On January 27, 1981, the Greenebaum law firm, representing the FDIC, filed FDIC's complaint in the United States District Court for the Eastern District of Kentucky, Pikeville Division, against the Kincers, Red Chief, and Dixon as a result of the execution by

them of the original note; and in a separate count, within the same suit, made claim against Bluston and Taylor and the Kincers on the obligation that was entered into on June 17, 1980, in the offices of the Greenebaum law firm.

Dixon answered by setting up certain defenses, among others, novation, release, discharge, waiver and estoppel. Bluston and Taylor, after proper service of process, failed to answer and subsequently on the 7th day of June, 1983, default judgment was entered against them in the sum of $243,006.69.

During the course of the proceedings the parties practiced the case on the issues raised, that of novation, release, discharge, and in the case of the Kincers, fraud as well.

The trial lasted three days and at the conclusion of the second day the parties had concluded all proof and rested. Prior to submitting the case to the jury, the Court asked counsel for the FDIC if the FDIC could be a holder in due course. The following colloquy took place at the transcript of trial proceedings, pages 2-219 through 2-220:

> Mr. Craft: One other matter, Judge. I would move the Court and although I did not submit this in writing in my proposed instructions, but I would move that somewhere in the instructions His Honor would instruct the jury that the FDIC stands in the exact position of the Mission State Bank, that they don't acquire any greater rights nor any less rights than were—

The Court: That is what bothered the Court. Let's ask this young gentlemen.

Can the FDIC be an HDC?

Mr. Reeves: Excuse me, Your Honor?

The Court: Can the FDIC be a holder in due course?

Mr. Reeves: I don't see any reason why it couldn't. I think this question may be set out in the statute, Your Honor, and I am not really certain.

The Court: That is the thing that is on the Court's mind right now. That is the only difference between release and defense is holder in due course coming in. But the FDIC, did they get this paying in consideration, et cetera, et cetera, et cetera, which a holder in due course is?

That is a good issue, something which I hope at 8:30 I can decide in the morning. You know, some defenses aren't good against a holder in due course. Isn't that right?

Mr. Craft: Yes, sir. But there has been no, absolutely no testimony in the record at all —

The Court: No, sir.

The Court then directed that all counsel be prepared to respond to the question of whether or not the FDIC could be a holder in due course as set forth in the above colloquy. The next morning, May 31, 1984, and prior to making arguments to the jury, the Court engaged in the following discussion with FDIC's counsel at transcript of trial proceedings, page 3-2:

(Call to Order of the Court)

The Court: All right, Mr. West.

Mr. West: Yes, Your Honor. I must say to the Court in all candor that last night we did what the Court asked us to do and I do believe that we have found a statute provision in the United States Code that entitles the FDIC to judgment in this case at this time as a matter of law.

The Court: I assume you are speaking of 12:1823(e).

Mr. West: That's correct, Your Honor. And there are a couple of cases annotated under that statute that are virtually identical with the case before the Court.

The case was submitted to the jury which was instructed by the court from pages 3-56 through 3-70 of the transcript of trial proceedings. Special interrogatories were submitted and found in the Record as document 73. The instructions given by the court described the FDIC as a *receiver,* and not in *corporate capacity,* as acquiring the assets of the failed bank. This is the same instruction tendered to the court by the plaintiff, FDIC, found in the Record at document 69, and numbered Instruction No. 9.

The jury returned a verdict in favor of the Kincers, Red Chief, and Dixon, specifically finding that fraud had occurred, and most importantly to Dixon, finding that it was the intent of the parties, including the bank, at the meeting held in the Greenebaum law firm in June, 1980, that all parties to the first obligation, *including Dixon,* were discharged.

The Judge then thanked the jury and the following exchange took place (Transcript of trial proceedings, Pages 3-98 through 100):

> Ladies and gentlemen of the jury, on behalf of the Court thank you very much for having sat on the jury and for your attendance here in court each day.
>
> You will be notified by mail when you are next to report for jury duty.
>
> Again on behalf of the Court thank you very much.
>
> (Jury out at 1:23 p.m.)
>
> The Court: All right. What says the plaintiff?
>
> Mr. West: What does the Court wish the plaintiff to say?
>
> The Court: Whatever turns you on, Mr. West.
>
> Mr. West: Well, I guess we would tender a judgment to the Court, Your Honor, of the jury's verdict and proceed from there. It appears to me the jury has granted judgment in favor of the FDIC for the individual notes, on the individual notes the Kincers signed.
>
> The Court: Yes, sir. Well, they have answered those special interrogatories. Now the Court must enter judgment based upon the special verdicts of the jury.
>
> Here is the feeling of the Court, gentlemen. The Court feels that the—that judgment should be denied as to Counts 2 and Count 3 by reason of the fact that the jury made a finding of fact that fraud was involved with regard to those proceedings.

The Court feels that judgment ought to be entered for the plaintiff against all of the defendants individually and jointly upon Count 1, which would be the original promissory note which they executed, in an amount subject to the credits which are stated plus the interest which is accrued.

Now, the reason the Court will not accept the verdicts of the jury with regard to Count 1 is because of 12 U.S.C. section 1823(e) which says that the defendants may not assert the affirmative defenses which they assert as to Count 1.

Mr. Golden: Judge, will you hear us on that, please?

The Court: I am going to give you a little additional time to hear you. I am giving that judgment. The judgment will not become final but I will give you 30 days to submit to me a memorandum as to why that judgment should not become final. If you want to tell me right now I would be glad to hear it.

Mr. Golden: Well, of course we were breathing a deep sigh of relief over on this side of the room and to have the jury verdict set aside —

The Court: I don't make the law, sir.

Mr. Golden: No, I understand. But the finding of the jury would indicate that it was not an asset at that time.

The Court: No. No. The finding of the jury just indicates that they felt that there was a discharge by reason of the fraud in the side agreement. Now, that indicated the jury's feeling as to that. But 12 U.S.C. section 1823(e) says you can't use those defenses to set aside something which was there.

Mr. Golden: Judge, but it is like any other federal statute, it must be proven and, if I might, in their complaint, paragraph 6, they allege that they acquired the assets pursuant to section 1823 (a). We deny that in our answer.

The Court: A statute has to be proved?

Mr. Golden: The elements.

The Court: The Court takes judicial notice of statutes.

Mr. Golden: But the elements of their complaint, Judge, they did not prove. In fact, until yesterday Mr. West did not even know the existence of §1823. And he did not move the Court to even set aside the judgment. He simply said he would prepare a judgment in conformity and I feel like it works a handicap. The jury heard evidence. I believe that —

The Court: This jury doesn't decide law.

The court entered what has been subsequently referred to as a provisional judgment on June 1, 1984, wherein it declined to accept number 5 of the special verdict of the jury by reason of 12 U.S.C. section 1823(e), but did accept the special verdict of the jury, number 4, that Koester made fraudulent representations in the second transaction which were the subject matter of counts II and III of the complaint.

Further, the Court, on its own initiative, granted judgment notwithstanding the verdit of the jury for the plaintiff, against Red Chief, the Kincers, and Dixon on the promissory notes executed on February 24, 1978 in the sum of $272,500.00. Various post-trial motions

were made by Dixon but were overruled. The court entered a memorandum opinion and an order and final judgment on July 24, 1984. Dixon filed his timely notice of appeal on October 10, 1984. The Court of Appeals for the Sixth Circuit affirmed the judgment of the trial court, and a motion for rehearing was denied June 23, 1986.

REASONS FOR GRANTING THE WRIT

I. The decision of the United States Court of Appeals for the Sixth Circuit that a trial judge may, *sua sponte*, make and grant a motion for judgment notwithstanding the verdict to Fed. R. Civ. P. 50(b) is in direct conflict with both the language of the rule and the court's decision in *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48.

Rule 50(b) only authorizes "a party" to make the motion. Although many of the rules specifically authorize the court to introduce motions during a trial (see for example Fed. R. Civ. P. 11, 12(f), 16(f)), 50(b) does not. Neither the rule nor the comments to it indicate an intention for *sua sponte* actions on the part of a trial court.

The language is clear and unambiguous, and absent any showing of judicial intent to mean otherwise, the court should be bound to follow the precise terms of its own rules.

Yet, despite the clear language of Rule 50(b), courts have attempted to judicially modify the rule to permit a *sua sponte* motion, usually in situations where a court of review believes the evidence is insufficient to warrant a new trial. In this context, the Supreme

Court has specifically addressed the issue in *Johnson* v. *New York, N.H. & H.R. Co.*, 344 U. S. 48, where it held that such conduct by a reviewing court is legally impermissible under the language of 50(b). Although the specific issue before the court was the propriety of *sua sponte* conduct by a court of review, the holding there clearly prohibited the trial court complained of in this action.

In *Johnson*, Justice Black wrote:

> On several recent occasions we have considered Rule 50 (b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a new verdict the rule prohibits *the trial judge* or an appellate court such a judgment. (Citations omitted—emphasis added).

344 U. S. 48 at 50.

Thus, Wright and Miller, have recognized that the rule of *Johnson* flatly prohibits such *trial court* conduct, despite the absence of this specific issue before the court. They write:

> . . . There has been some contention that the Johnson case limits only the power of the appellate court, and that the trial court can enter judgment notwithstanding the verdict, where it expressly reserved decision on the motion for a directed verdict, even though an appellate court could not do so order. Such holdings fly in the face of the language of the Johnson case that the rule forbids the trial judge or appellate court to enter such a

> judgment, and cannot be defended. (Footnotes omitted).

Wright and Miller, Federal Practice and Procedure: Civil § 2537 at page 604-5.

The explicit language of Rule 50(b), and of *Johnson,* is firmly grounded in public policy. Justice Black recognized this policy in the *Johnson* decision when he stated:

> . . . This requirement of a timely application for judgment after verdit is not an idle motion. This verdict solves factual questions against the post-verdict movant and thus emphasizes the importance of the legal issues. The movant can also ask for a new trial either for errors of law or on discretionary grounds. The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. See *Cone* v. *West Virginia Pulp & Paper Co., supra,* 330 U. S. at pages 217-218, 67 S.Ct. at pages 755-756. Poor support for its abandonment would be afforded by the mere fact that a judge makes an express reservation of a decision which the rule reserves regardless of what the judge does.
>
> Rule 50(b) as written and as construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and intentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end. In 1946 this Court was asked to adopt an amendment to the rule which would have given appellate courts power to enter judgments for parties who, like this respondent, had made no timely motion for judgment not-

> withstanding the verdict. We did not adopt the amendment then. 5 Moore, Federal Practice (2d ed. 1951) —— 50.01 [7], 50.02 [9], 50.11.
>
> No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation.

344 U. S. at 53, 54.

Yet, despite the clear and unambiguous language of the rule, the *Johnson* decision, and the underlying policy, some circuits, under the guise of judicial economy, have chosen to disregard the law and instead substitute their own standards. *(See First Safe Deposit Nat. Bank* v. *Western Union Tel. Co.,* 337 F. 2d 743 (1st Cir. 1964), and *Shaw* v. *Edward Hines Lumber Co.,* 249 F. 2d 434 (7th Cir. 1957). The Sixth Circuit now wishes to follow suit.

In the case at bar, the Sixth Circuit Court of Appeals attempted to justify their decision on this issue thusly:

> To accept the defendant's argument that the court was powerless to set aside the jury's unlawful verdict and enter instead an lawful judgment simply because the plaintiff's counsel did not utter the Rule 50(b) formula language asking for a judgment n.o.v., would effectively reduce the office of the trial judge in this case to that of a mere clerk, bound to ignore the law of which he was aware because it was not superfluously brought to his attention by counsel. We think substantial justice does not depend upon such a procedural incarnation by plaintiff's counsel.

Page 10.

Such reasoning might have rational appeal if the appellate court's sole task was to ratify the trial court's behavior in this case, yet this type of analysis is clearly outcome-oriented and it fails to take into account the basic issue here—that the practice of a trial court granting a judgment n.o.v. absent a motion from a party removes the judge from his mandated role as an impartial magistrate, and is in clear violation of the law.

II. The decision of the United States Court of Appeals for the Sixth Circuit that a United States District Court may grant a judgment notwithstanding the verdict on a ground which was not stated in the party's motion for directed verdict is in direct conflict with both the language of the rule and court decisions based on the rule.

Fed. R. Civ. P. 50(b) states that, "a party who has moved for a directed verdict may move to have the verdict . . . set aside and to have judgment entered *in accordance with his motion for a directed verdict* . . ." (emphasis added).

Rule 50(a) states, ". . . a motion for a directed verdict shall state specific grounds therefor . . .".

Thus read together, the rule plainly means that a party may move to have judgment entered only in accordance with the specific grounds stated in his earlier motion directed verdict.

Courts have uniformly held that a judgment notwithstanding the verdict *must* be based upon grounds stated in the party's earlier motion for directed verdict. *Meyers* v. *Moody,* 475 F. Supp. 232 (N.D. Tex. 1979),

Sharp v. *Coopers & Lybrand*, 457 F. Supp. 879 (E.D. Pa. 1978).

Commentators are likewise in accord. Wright & Miller state:

> A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, must state the grounds on which it was made. Since it is technically only a renewal of the motion for directed verdict made at the close of the evidence, *it cannot assert a ground that was not included in the motion for a directed verdict.* (footnotes omitted—emphasis added).

Wright & Miller, Federal Practice and Procedure: Civil § 2537.

Similarly, Moore writes:

> Thus, a party who fails to move for a directed verdict at the close of all the evidence cannot ask the court to rule on the legal sufficiency of the evidence supporting a verdict for his opponent, or raise the question on appeal. *Nor may a party base a motion for judgment n.o.v. on a ground that was not included in a prior motion for a directed verdict.* (footnotes omitted, emphasis added).

Moores Federal Practice, § 50.08.

Thus the Court of Appeals for the Sixth Circuit erred when they affirmed the decision of the United States District Court for the Eastern District of Kentucky, Pikeville Division, since judgment n.o.v. was entered by that court on a ground that was not included in a prior motion for a directed verdict.

III. The Court of Appeals erroneously applied 12 U.S.C. § 1823(e) in affirming the decision of the United States District Court for the Eastern District of Kentucky to vacate the jury's verdict in favor of petitioner.

In the instant case, the trial court based its rationale on the application of 12 U.S.C. § 1823(e). The Court of Appeals upheld this decision as well.

12 U.S.C. § 1823(e) was enacted to protect the FDIC from defenses based upon "secret side agreements" between banks and their customers which might vary the express terms of promissory notes which the bank held. The policy behind granting the FDIC this protection is obvious—without it, the FDIC, upon being placed in receivership of a failed bank, could not readily ascertain the amount of assets of the bank without first checking with the makers of every note to determine the unwritten agreed-upon terms of payment.

In this case, petitioner's co-makers on the original note asserted that there existed such a "side agreement" in order to induce them to sign notes for a second transaction, which petitioner did not sign, or even have knowledge of. Petitioner did not allege, nor assert a defense based upon a secret side agreement. Rather, his defenses were based upon a number of theories, including novation, release, and discharge.

The subject of Interrogatory No. 5 to the jury was to determine the effect of this "second transaction" which did conform to each of the four elements of 12 U.S.C. § 1823(e).

The language of 12 U.S.C. § 1823(e) states, "(n)o agreement . . . shall be valid . . . unless . . .". In this

case, the "agreement" used by petitioner to diminish or defeat the right of the FDIC was the second transaction entered into by the other defendants in this action. Again, this second transaction met each of the four elements of 12 U.S.C. § 1823(e), and therefore, *could* be used to "diminish or defeat the right of the FDIC." And the jury found that it did.

The trial court overturned the jury's decision based upon its belief that the jury must have thought that a side agreement existed as to the second transaction, and therefore that the original obligation was extinguished. In other words, the trial court (1) speculated on *how* the jury reached its decision; then (2) decided that this manner of decision-making was incorrect as it failed to take into account 12 U.S.C. § 1823(e); then (3) overtuted its judgment for that of the jury.

The Court of Appeals took the same steps to reach the same result. It stated, "It is *only* by virtue of the claimed side agreement between the bank and the Kincers that the jury *could* have found that the assumption was intended to extinguish the liability of the original parties." (Emphasis added). (P. 5).

Despite these words of certainty by which the Court of Appeals state their belief, petitioner states that this is simply not the case. Petitioner set up and argued a number of defenses, any of which the jury may have believed operated to relieve him of the original obligation. And again, none of the defenses asserted by *petitioner* involved a secret side agreement, and the decision by the trial court to grant judgment n.o.v.,

based upon a statute which prohibits a defense based upon a secret side agreement, is clearly in error.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the Court of Appeals for the Sixth Circuit entered on April 29, 1986.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Joseph J. Golden, counsel for petitioner, hereby certify that forty (40) copies of the foregoing Writ of Certiorari was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and three (3) copies to John A. West and Danny C. Reeves, Greenebaum, Doll & McDonald, 1400 Vine Center Tower, P. O. Box 1808, Lexington, Kentucky 40593, on this 19th day of September, 1986, by personally depositing the same in the United States mailbox, First Class postage prepaid, I further certify that all parties required to be served have been served.

Joseph J. Golden

JOSEPH J. GOLDEN

APPENDIX

BEST AVAILABLE COPY

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 84-5919

FEDERAL DEPOSIT INSURANCE CORPORATION, - - - - *Plaintiff-Appellee,*

v.

C. K. DIXON, JR., - - - *Defendant-Appellant.*

On Appeal From the United States District Court for the Eastern District of Kentucky

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JUDGMENT—Filed April 29, 1986

Before: CONTIE and RYAN, Circuit Judges, and BROWN, Senior Circuit Judge.

PER CURIAM. Defendant C. K. Dixon, Jr. appeals from the district court's entry of judgment notwithstanding the verdict in favor of the F.D.I.C. on the basis of 12 U.S.C. § 1823(e) in this action for the collection of a debt.

I.

On February 24, 1978, Red Chief Coal, Inc., and its owners, G. C. Kincer, Richard Kincer, Albert Kincer, and C. K. Dixon, borrowed the sum of $272,500 from the Mission State Bank. The collateral given for the loan was heavy equipment used for mining coal, and the owners were accommodation parties on the note. By the terms of the note, the debtors agreed to allow the bank to exchange or release

the collateral without notice to the debtors, and without affecting their liability.

The debtors defaulted on the note after making one payment and subsequent efforts by a bank representative, Robert Koester, to collect the debt were unavailing. Subsequent to a meeting with the debtors, at which Koester was unsuccessful in collecting the debt, Koester was contacted by Rodney Taylor, who expressed an interest in obtaining collateral securing the loan. At a meeting held on June 17, 1980, the Kincers, Koester, and Taylor reached an agreement whereby Taylor and Bluston Mining Company assumed $240,000 of the debtors' obligation in return for the collateral, and the principals of Red Chief, the three Kincers and appellant Dixon, were to divide the remaining liability on the original obligation. The original debtors were not released from their obligation on the note, except to the extent that payments were made on that obligation.

The Kincers maintained at trial that, in order to persuade the debtors to agree to this transaction, Koester secretly promised that the debtors, including appellant Dixon, would be released from their liability on the note as well as their liability under the guaranty agreement given in connection with the promissory note executed by Taylor. Dixon was not present at this meeting, nor did he sign any of the documents generated by the meeting.

On August 8, 1980, the lender, Mission State Bank, failed and the Kansas State Bank Commissioner asked that the F.D.I.C. be appointed receiver pursuant to 12 U.S.C. § 1821(e). Certain assets were sold and certain liabilities were transferred to the Mission Bank. The remaining assets were then sold to the F.D.I.C. in its corporate capacity, including the note executed by the debtors.

On January 27, 1982, the F.D.I.C. filed a four-count complaint in the United States District Court for the Eastern District of Kentucky, Pikeville Division, seeking

recovery against the debtors on the original note. The complaint also sought relief against Taylor and Bluston Mining on the Taylor note, against the Kincers on their guaranty agreement of the Taylor note, and on the individual notes executed in conjunction with the Taylor note.

The collateral securing the note was sold at public auction, and the net proceeds of $45,275 were applied to the amount owed by the debtors. A default judgment was entered against Taylor and Bluston Mining on June 7, 1983. Trial began on May 29, 1984. After the conclusion of proofs, and during the F.D.I.C.'s argument for a directed verdict, the Court raised the issue of whether F.D.I.C. was a holder in due course. This issue and the issue of the application of 12 U.S.C. § 1823(e) were considered by the court, and the F.D.I.C.'s motion for a directed verdict was taken under advisement. Five special verdict questions were submitted to the jury. The jury found that defendants owned nothing under the original promissory note; that the Kincers were liable under their guaranty agreement of the Taylor note; that the Kincers were liable under the individual promissory notes; that the Kincers were fraudulently induced into executing the Taylor assumption transaction documents; and that the assumption transaction fully released all defendants from liability under the original promissory note. The district court declined to accept special verdict number five of the jury—that the assumption transaction released the defendants from their liability—and entered a judgment notwithstanding the special verdict in favor of the F.D.I.C., based on the effect of 12 U.S.C. § 1823(e). Defendant Dixon appeals from that judgment.

II.

12 U.S.C. § 1823(e) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation [the F.D.I.C.]

> in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

12 U.S.C. § 1823(e) does not itself provide the F.D.I.C. with holder in due course status. *F.D.I.C.* v. *Wood,* 758 F. 2d 156 (6th Cir. 1985). However, where there is an oral side agreement between the parties, such as an oral promise by the bank to make future loans, § 1823(e) can be applied to make such an agreement unenforceable against the F.D.I.C., without finding that the F.D.I.C. has holder in due course status. *F.D.I.C.* v. *Hatmaker,* 756 F. 2d 34, 37 (6th Cir. 1985). The written agreement between the bank, Taylor, Bluston Mining, and the Kincers expressly preserves the original parties' liability on the note. It is only by virtue of the claimed side agreement between the bank and the Kincers that the jury could have found that the assumption was intended to extinguish the liability of the original parties. Under § 1823(e), such an unwritten agreement is not valid against the F.D.I.C., since it diminishes the rights of the F.D.I.C. to the assets represented by the loan agreement. Dixon's argument that the second loan constitutes a novation is without merit. The language of the loan agreement states that it does not extinguish the original debtors' liability, thus it cannot be a novation. To show that the second agreement did extinguish the original liability, Dixon must interpose the side agreement between

the bank and the Kincers. Section 1823(e) does not allow that unwritten agreement to be enforced against the F.D.I.C.

III.

Dixon maintains that the district court's entry of judgment notwithstanding the special verdict is contrary to the provisions of Fed. R. Civ. P. 50(b) which requires that a motion be made by one of the parties. The rule, in pertinent part, provides:

> Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict
>
> * * *
>
> (b) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. . . .

Thirty-four years ago the United States Supreme Court held, in *Johnson* v. *New York, New Haven & Hartford R. Co.*, 344 U. S. 48 (1952), that since the party in whose favor a judgment n.o.v. had been entered by the appellate court had not moved for such a judgment following announcement of the jury verdict, the *appellate court* was powerless to enter such a judgment and could only remand

for a new trial. On the basis of that holding, the appellant asks us to set aside the judgment n.o.v. entered in plaintiff's favor in this case. Despite thirty years and more of scholarly criticism of the rule announced in *Johnson*, we are, nevertheless, bound to follow the holding of that case if its rule of law is controlling of the issue before us. We think it is not.

In *Johnson,* a wrongful death case against a railroad, following submission of all the evidence, the defendant moved for a directed verdict on the grounds that no negligence had been proven, and that the deceased had been responsible for his own death. The trial court reserved decision on the motion and submitted the case to the jury which returned a verdict for the plaintiff. Ten days thereafter, the defendant moved to have the verdict set aside on the ground that it was excessive and contrary to the law, and contrary to the weight of the evidence. About two months later, the trial court denied the post-verdict motion and, in the same order, denied a pre-verdict motion to dismiss which had been taken under advisement. The United States Court of Appeals reversed, holding that the defendant's motion for directed verdict which had been taken under advisement should have been granted. In order to dispose of the matter, the appellate court granted a judgment notwithstanding the verdict. It was that action which was appealed in *Johnson,* and which resulted in reversal by the United States Supreme Court with announcement of the rule that an appellate court had no power to enter a judgment notwithstanding the verdict unless a motion for such relief had been made by one of the parties in the trial court.

The case before us is distinguishable from *Johnson.* First, the judgment n.o.v. in this case was granted by the

trial court not by an appellate court.[1] Second, and more significantly, we think, the case before us is distinguishable from *Johnson* because here the proceedings before the trial court constituted the essential equivalent of a motion and heading for judgment notwithstanding the verdict. See *Warkentien* v. *Vondracek*, 633 F. 2d 1, 2 n.1 (6th Cir. 1980).

It is evident from the record that immediately upon announcement by the jury of its answers to the five special verdict questions, the trial court was aware that the jury's findings were contrary to the law and that a verdict entered in conformity with those findings would violate § 1823(e).

Rather than adjourn the proceedings and wait for plaintiff's counsel to prepare, file, serve, and notice for rehearing a written motion for judgment notwithstanding the verdict, the trial judge, unquestionably sensitive to the requirements of administrative and judicial efficiency dictated by a crushing backlog of trial court litigation, proceeded

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[1]We are aware that in *Johnson*, Justice Black stated:

> On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment. Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212, 91 L. Ed. 849, 67 S. Ct. 752. We repeated that construction of the rule in Globe Liquor Co. v. San Romain, 332 U. S. 571, 92 L. Ed. 177, 68 S. Ct. 246, and reemphasized it in Fountain v. Filson, 336 U. S. 681, 93 L. Ed. 971, 69 S. Ct. 754.

That, despite the court's earlier statement of the issue the court was addressing:

> Whether the *Court of Appeals* could direct such a judgment consistently with Rule 50(b) of the Federal Rules of Civil Procedure is the *single question* we granted certiorari to review.

344 U. S. at 50. (Emphasis added, footnote omitted.)

directly to address the issue before him: the unlawfulness of the jury's verdict. The court stated:

> Here is the feeling of the Court, gentlemen. The Court feels that the—that judgment should be denied as to Count 2 and Count 3 by reason of the fact that the jury made a finding of fact that fraud was involved with regard to those proceedings.
>
> The Court feels that judgment ought to be entered for the plaintiff against all of the defendants individually and jointly upon Count 1, which would be the original promissory note which they executed, in an amount subject to the credits which are stated plus the interest which is accrued.
>
> Now, the reason the Court will not accept the verdicts of the jury with regard to Count 1 is because of 12 U.S.C. § 1823(e) which says that the defendants may not assert the affirmative defenses which they assert as the Count 1.

The court then announced an intention to enter judgment for plaintiffs notwithstanding the jury's legally erroneous responses to the verdict questions, but to delay the finality of that judgment for thirty days in order to give counsel for the defendants an opportunity "to submit to me a memorandum as to why the judgment should not become final."

From a reading of the record of the lengthy colloquy between the court and counsel which followed the court's statement of intention to render for the plaintiffs, it is plain that all were aware that the court intended, unless dissuaded by the argument of defense counsel, to enter a judgment n.o.v. because the jury verdict was unlawful under § 1823(e). The colloquy was the essential equivalent of a hearing on a motion for judgment n.o.v.; the court

asking rhetorically whether it wasn't clear that the provisions of § 1823(e) precluded, as a matter of law, the entry of a verdict in conformity with the jury's answers to the special verdict questions and required entry of a judgment notwithstanding that verdict for the plaintiff, and the defendant insisting that, on the facts, the statutory bar of § 1823(e) should not be controlling.

There is no question that defense counsel was aware that it was the court's intention to enter a judgment notwithstanding the verdict, but one whose finality would be deferred for thirty days to afford defense counsel even further opportunity to consider the propriety of such action and to be heard on the matter.[2]

To accept the defendant's argument that the court was powerless to set aside the jury's unlawful verdict and enter instead an unlawful judgment simply because the plaintiff's counsel did not utter the Rule 50(b) formula language asking for a judgment n.o.v., would effectively reduce the office of that trial judge in this case to that of a mere clerk, bound to ignore the law of which he was aware because it was not superfluously brought to his attention by counsel. We think substantial justice does not depend upon such a procedural incantation by plaintiff's counsel. All parties were aware of what was taking place: the court entered only a provisional judgment allowing the

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[2]Defense counsel had been alerted to the argument that § 1823 (e) may have been an obstacle to one of its defenses since the plaintiff moved for a directed verdict on that ground at the close of all the proofs in the case. Moreover, during the colloquy with the trial court after the jury was discharged, defense counsel stated:

> Your honor, I guess I'm kind of confused. But if I understand the Court's ruling, you are actually giving the plaintiff a judgment n.o.v.
>
> The Court: Right.

parties thirty days to submit memoranda arguing that the judgment should not become final. Given the factual situation before him, the trial judge was entitled to react to the erroneous decision of the jury by refusing to accept the special verdict based on a solid application of the law. The court's entry of a provisional judgment, following a lengthy colloquy concerning the substantive merits of the only basis upon which a judgment notwithstanding the verdit could be entertained, was the equivalent of requiring plaintiff's counsel to move for a judgment notwithstanding the verdict. At that point, there would have been no purpose served by requiring plaintiff to retire to his office in order to prepare and notice for rehearing a written motion for the relief counsel and the Court had considered at length and would, at defense counsel's election, consider once again within the ensuing thirty days.

In the circumstances, we are not required to construe Rule 50(b) as requiring a written motion. The judgment of the district court is affirmed.

Issued as Mandate: 7/1/86

Cost: none

No. 84-5919

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, - - - - - *Plaintiff-Appellee,*

v.

C. K. DIXON, JR., - - - - *Defendant-Appellant*

ORDER—Filed June 23, 1986

BEFORE: CONTIE, RYAN, Circuit Judges and BROWN, Senior Circuit Judge

Upon consideration of the petition for rehearing filed herein by the defendant-appellant, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

Entered By Order of the Court
John P. Hehman, Clerk

(s) Leonard Green
Leonard Green, Chief Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION - - - - - - - - *Plaintiff*

v.

RED CHIEF COAL, INC., G. C. KINCER; ALBERT KINCER; RICHARD KINCER; and C. K. DIXON, JR. - - - - - *Defendants*

JUDGMENT—Filed June 1, 1984

The Court declines to accept the special verdict of the jury, Number 5, by reason of 12 United States Code 1823 (e). The Court accepts the special verdict of the jury, Number 4, that Robert G. Koester, agent and representative of the Mission State Bank, made fraudulent representations in the second transaction, the subject matter of Counts 2 and 3.

The Court grants judgment notwithstanding the special verdicts of the jury, for the plaintiff, Federal Deposit Insurance Corporation, against the defendants, Red Chief Coal, Inc., Albert Kincer, Richard Kincer, G. C. Kincer, and C. K. Dixon, Jr., jointly and severally upon the promissory note executed February 24, 1978, in the sum of $272,500.00, with interest and costs.

The defendants are granted thirty (30) days, to and including July 2, 1984, in which to file memorandum of points and authorities as to why the judgment of the Court

should not become final. The plaintiff is granted fifteen (15) days thereafter, on or before July 17, 1984, in which to file responsive memoranda, at which time the matter shall stand submitted for consideration by the Court.

This 31st day of May, 1984.

(s) G. Wix Unthank
G. Wix Unthank, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION - - - - - - - *Plaintiff,*

v.

RED CHIEF COAL, INC., Et Al. - - - *Defendants.*

FINAL JUDGMENT—Filed July 24, 1984

The judgment entered in this action on the 7th day of July, 1983, and the judgment entered on the 1st day of June, 1984, are AFFIRMED and made a part of this judgment by reference.

It is further ORDERED AND ADJUDGED that the defendants be and are entitled to credit for a set-off in a sum equal to the net proceeds derived from the sale of security in July, 1982.

The liability for the first and second transactions sued upon isn't cumulative but is an alternative liability.

This is an action between multi-parties involving multiple issues.

This is a FINAL JUDGMENT upon all issues as to all parties.

This 24th day of July, 1984.

(s) G. Wix Unthank
G. Wix Unthank, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION - - - - - - - *Plaintiff,*

v.

RED CHIEF COAL, INC., Et Al. - - - *Defendants.*

MEMORANDUM OPINION AND ORDER

—Filed July 24, 1984

On the 31st day of May, 1984, this Court entered judgment, upon the acceptance of several special interrogatories returned by the jury and denied the return of others. The defendants have moved the Court to alter or amend such judgment and the Court having considered same and being advised is of the opinion:

(a) 12 U.S.C. 1823(e) was not unfairly raised by the Court for the first time. The attention of the parties is directed to paragraph 6 of the plaintiff's complaint.

(b) The alleged and controverted oral agreement of Koester was not a part of the writing of the first or second transaction. It is an alleged and controverted "side agreement".

(c) The second transaction was not a novation.

(d) The sale of some of the security was not without notice and was not an impairment of security.

(e) Plaintiff is not entitled to double recovery nor are defendants subject to double liability.

(f) The defendants are entitled to credit or set-off for the net proceeds derived from the sale of said security.

IT IS THEREFORE ORDERED that the Motions to Alter or Amend the judgment entered on the 31st day of May, 1984, be DENIED. It is further ORDERED that FINAL JUDGMENT be entered pursuant to this Memorandum Opinion and Order.

This 24th day of July, 1984.

(s) G. Wix Unthank
G. Wix Unthank, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 82-08

FEDERAL DEPOSIT INSURANCE CORPORATION, - - - - - - - *Plaintiff,*

v.

RED CHIEF COAL, INC., Et Al. - - - *Defendants.*

AMENDED JUDGMENT—Filed September 11, 1984

Plaintiff Federal Deposit Insurance Corporation having moved the Court to amend the Final Judgment previously entered in this matter and having heard arguments of counsel and being sufficiently advised, it is hereby

ORDERED AND ADJUDGED that the judgment entered July 24, 1984 be and is amended as follows:

Judgment be and is entered in favor of the plaintiff against defendants Red Chief Coal, Inc., G. C. Kincer, Albert Kincer, Richard Kincer and C. K. Dixon, Jr., jointly and severally, upon the promissory note executed February 24, 1978 in the principal amount of $272,500.00. This sum shall be reduced by payments in the amount of $16,841.91, credited March 30, 1978, and $15,589.68, credited August 1, 1980. This amount shall also be reduced by $45,275.00, representing the net proceeds received by the plaintiff upon sale of the collateral securing the promissory note. This amount shall be credited as received July 28, 1982.

Interest shall accrue on this judgment, subject to the aforementioned credits, from February 24, 1978 until July 24, 1984 at the rate set forth in the promissory note

(13.76%). Thereafter, the rate of interest on the unpaid principal shall be reduced to 12.17% pursuant to 28 U.S.C. § 1961. Plaintiff shall also be entitled to recover its costs.

This is a Final Judgment and there is no just cause for delay.

This 11th day of September, 1984.

(s) G. Wix Unthank, Judge
United States District Court

Supreme Court, U.S.
FILED
OCT 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

C. K. DIXON, JR.

Petitioner,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Counsel for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

The Respondent elects to state the issues presented by the Petition For Writ of Certiorari as follows:

I. Whether the district court's refusal to accept the jury's finding constitutes reversible error pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure and applicable case law construing that rule.

II. Whether the United States Court of Appeals for the Sixth Circuit erroneously applied 12 U.S.C. § 1823(e) in affirming the district court's judgment.

CORPORATE AFFILIATION

Respondent is a corporation created by Congress pursuant to 12 U.S.C. § 1811, and, accordingly, Respondent does not have any parent, subsidiaries or affiliates requiring disclosure pursuant to Sup. Ct. R. 28.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-452

C. K. DIXON, JR.

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RULES AND STATUTORY PROVISIONS

The text of the following rules and statutes are set forth in the Appendix hereto:

Fed. R. Civ. P. 50(b) ..... 1a.
Fed. R. Civ. P. 58 ..... 2a.
Sup. Ct. R. 17.1 ..... 3a.
12 U.S.C. § 1823(e) ..... 4a.
Ky. Rev. Stat. § 355.3-606 ..... 5a.

STATEMENT OF THE CASE

Respondent adopts as its statement of the case the following facts, most of which are set forth in the

opinion of the United States Court of Appeals for the Sixth Circuit:

On February 24, 1978 Red Chief Coal, Inc. and its owners, G. C. Kincer, Richard Kincer, Albert Kincer, and C. K. Dixon ("Petitioner"), borrowed the sum of $272,500 from the Mission State Bank in Mission, Kansas. The collateral given for the loan was heavy equipment used for mining coal, and the owners, including Petitioner, were accommodation parties on the note. By the terms of the note, the debtors agreed to allow the bank to exchange or release the collateral without notice to the debtors, and without affecting their liability.[1]

The debtors defaulted on the note after making one payment and subsequent efforts by a bank representative, Robert Koester, to collect the debt were unavailing. After a meeting with the debtors at which Koester was unsuccessful in collecting the debt, a third party, Rodney Taylor, expressed an interest in obtaining the collateral securing the loan. Thereafter, the Kincers, Koester, and Taylor reached an agreement whereby Taylor and Bluston Mining Company

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[1] Notwithstanding any subsequent argument by Petitioner to the contrary, both the district court and the Sixth Circuit found Petitioner to have waived notice by virtue of this provision. *See* KRS 355.3-606. The Kentucky Commentary to this section provides, in relevant part, "[c]onsent may be given in advance, and is commonly incorporated in the instrument; or it may be given afterward. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge." Although Petitioner states that he set up "a number of defenses, any of which the jury may have believed operated to relieve him of the original obligation" (Petition, p. 21) this is simply not the case. This issue was fully briefed before the court of appeals which found Petitioner's argument to be without merit.

assumed $240,000 of the debtors' obligation in return for the collateral, and the principals of Red Chief, the three Kincers and Petitioner, were to divide the remaining liability on the original obligation. The original debtors *were not released from their obligation on the note*, except to the extent that payments were made on the obligation by Taylor and Bluston Mining Company.

The Kincers maintained at trial that, in order to persuade the debtors to agree to this transaction, Koester secretly promised that the debtors, including Petitioner, would be released from their liability on the note as well as their liability under the guaranty agreement given in connection with the promissory note executed by Taylor and Bluston Mining Company. Petitioner was not present at this meeting, nor did he sign any of the documents generated by the meeting. Conflicting testimony was presented at trial concerning whether Petitioner was subsequently given notice of the details of this meeting.

On August 8, 1980 the Mission State Bank failed and the Kansas State Bank Commissioner asked that Respondent be appointed receiver pursuant to 12 U.S.C. § 1821(e). Thereafter, certain assets were sold and certain liabilities were transferred to the Mission Bank. The remaining assets were then sold to Respondent in its corporate capacity, including the note executed by the debtors.

On January 27, 1982 Respondent filed a four-count complaint in the United States District Court for the Eastern District of Kentucky, Pikeville Division, seeking recovery against the debtors on the original note. The complaint also sought relief against Taylor and Bluston Mining on the Taylor note, against the Kin-

cers on their guaranty agreement of the Taylor note, and on the individual notes executed in conjunction with the Taylor note.

The Kincer defendants and Petitioner were called as witnesses during the presentation of the Respondent's case in the district court. In an effort to expedite the proceeding, the defendants' presented their case following cross-examination by Respondent's counsel (R. 2-45). At the conclusion of Respondent's case, all relevant evidence had been presented.

Following presentation of Respondent's case, both Respondent and Petitioner commenced their arguments on motions for a directed verdict in their favor (R. 2-183). After Petitioner's motion for a directed verdict was overruled, Petitioner was allowed to be recalled and brief testimony was presented which Petitioner's counsel deemed to be "rebuttal" (R. 2-195 to 2-198). Following this rebuttal, arguments on the motions for directed verdicts resumed (R. 2-200).

During Respondent's argument for a directed verdict, the district court raised the issue of whether Respondent stood in the position of a holder in due course of the original note (R. 2-220). This issue and the issue of the application of 12 U.S.C. § 1823(e) were subsequently argued by counsel and considered by the district court (R. 3-2 to 3-10). Respondent motion for a directed verdict was thereafter taken under advisement (R. 3-10). The case was then submitted to the jury by way of five special interrogatories. Based on the evidence presented, the jury found that the defendants owned nothing under the original promissory note; that the Kincers were liable under their guaranty agreement of the Taylor note; that the

Kincers were liable under the individual promissory notes; that the Kincers were fraudulently induced into executing the Taylor assumption transaction documents and; that the assumption transaction fully released all defendants from liability under the original promissory note. The district court declined to accept special interrogatory number five of the jury—that the assumption transaction had released the defendants from their liability.

After declining to accept the jury's finding, the district court entered a provisional judgment in favor of Respondent. Pursuant to the terms of this judgment, the parties were granted additional time to brief the application of 12 U.S.C. § 1823(e). Petitioner was unable to convince the Court that this section did not apply to the facts presented and, on July 24, 1984, a final judgment was entered in favor of Respondent. This judgment was affirmed by the court of appeals on April 29, 1986. Petitioner's motion for rehearing was denied on June 23, 1986.

ARGUMENT

I. Petitioner has failed to establish sufficient reason to invoke this Court's jurisdiction.

Petitioner has failed to establish or sufficiently allege any reason why this Court's jurisdiction should be invoked. Specifically, Petitioner has failed to show (i) that a conflict exists among the circuits on the issues presented; (ii) that the Sixth Circuit's decision or the decision of the district court so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision; or (iii) that the Sixth Circuit resolved the issues presented by the Petition in a way in conflict

with applicable decisions of this Court. Accordingly, the Petition for Writ of Certiorari should be denied. *See* Sup. Ct. R. 17.1.

II. The decision of the Sixth Circuit is not in conflict with this Court's decision in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952).

As set forth above, relying upon the provisions of 12 U.S.C. § 1823(e), the district court refused to accept the jury's finding that the parties to the original note had been released from liability under the note by virtue of a secret side agreement. Petitioner asserts that the actions of the district court in refusing to accept the jury's finding and its entry of a subsequent judgment in favor of Respondent is in conflict with this Court's holding in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952). This assertion is clearly erroneous. In *Johnson* the plaintiff brought suit under the Jones Act in federal court for the wrongful death of her husband. After all evidence had been submitted, defendant moved for dismissal of the complaint and for a directed verdict on the ground that negligence had not been proven. The district court reserved its decision on these motions and submitted the case to the jury which returned a verdict of $20,000 for plaintiff. Thereafter, defendant orally moved the court to set the verdict aside on the grounds that it was excessive, contrary to law, contrary to the evidence and contrary to the weight of the evidence. Two months later, this motion and defendant's pre-verdict motions were denied. On appeal the Second Circuit reversed, holding that the defendant's motion for a directed verdict should have been granted.

Thereafter, this Court granted certiorari to review the single question of whether the court of appeals had the power to direct entry of judgment n.o.v. In a 5-4 decision, it was held that, in the absence of an express motion for judgment n.o.v., the court of appeals was powerless to direct entry of judgment for the defendant and could only have remanded the case for a new trial. Clearly, the limited holding of *Johnson* is inapplicable to the facts presented here as the Sixth Circuit correctly held.

In reaching its decision the Sixth Circuit carefully analyzed the holding of *Johnson* and its application to the facts presented. In relevant part, the court stated:

> The case before us is distinguishable from *Johnson*. First, the judgment n.o.v. in this case was granted by the trial court not by an appellate court. [Footnote in original omitted.] Second, and more significantly, we think, the case before us is distinguishable from *Johnson* because here the proceedings before the trial court constituted the essential equivalent of a motion and hearing for judgment notwithstanding the verdict. See *Warkentien v. Vondracek*, 633 F.2d 1, 2 n.1 (6th Cir. 1980).
>
> It is evident from the record that immediately upon announcement by the jury of its answers to the five special verdict questions, the trial court was aware that the jury's findings were contrary to the law and that a verdict entered in conformity with those findings would violate § 1823(e).

Rather than adjourn the proceedings and wait for plaintiff's counsel to prepare, file, serve, and notice for rehearing a written motion for judgment notwithstanding the verdict, the trial judge, unquestionably sensitive to the requirements of administrative and judicial efficiency dictated by a crushing backlog of trial court litigation, proceeded directly to address the issue before him: the unlawfulness of the jury's verdict.

. . .

From a reading of the lengthy colloquy between the court and counsel which followed the court's statement of intention to render for the plaintiffs, it is plain that all were aware that the court intended, unless dissuaded by the argument of defense counsel, to enter a judgment n.o.v. because the jury verdict was unlawful under § 1823(e). The colloquy was the essential equivalent of a hearing on a motion for judgment n.o.v.; the court asking rhetorically whether it wasn't clear that the provisions of § 1823(e) precluded, as a matter of law, the entry of a verdict in conformity with the jury's answers to the special verdict questions and required entry of a judgment notwithstanding that verdict for the plaintiff, and the defendant insisting that, on the facts, the statutory bar of § 1823(e) should not be controlling.

There is no question that the defense counsel was aware that it was the court's intention to enter a judgment notwithstanding the verdict, but one whose finality would

> be deferred for thirty days to afford defense counsel even further opportunity to consider the propriety of such action and to be heard on the matter. [Footnote in original omitted.]
>
> . . .
>
> . . . The Court's entry of a provisional judgment, following a lengthy colloquy concerning the substantive merits of the only basis upon which a judgment notwithstanding the verdict could be entertained, was the equivalent of requiring plaintiff's counsel to move for a judgment notwithstanding the verdict. At that point, there would have been no purpose served by requiring plaintiff to retire to his office in order to prepare and notice for rehearing a written motion for the relief counsel and the Court had considered at length and would, at defense counsel's election, consider once again within the ensuing thirty days.

Although the holding of *Johnson* has been criticized as an overtechnical application of the Federal Rules of Civil Procedure[2], it is not necessary for this Court reverse *Johnson* to uphold the decision of the court of appeals. The facts presented here are clearly distinguishable from those in *Johnson*. *See First Safe Deposit National Bank v. Western Union Tel. Co.*, 337 F.2d 743 (1st Cir. 1964) (upholding the district court's entry of judgment n.o.v. occurring within six days of

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[2] See dissenting opinion of Justice Frankfurter at 344 U.S. 54-64. *See also*, 38 Cornell Law Quarterly 449 (1953). 21 George Washington Law Review 818 (1953); 31 Texas Law Review 913 (1953); 6 Vanderbilt Law Review 791 (1953).

the verdict since the court could have asked the defendant to file an immediate Rule 50(b) motion and thereafter act upon it); *see also Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434 (7th Cir. 1957) (distinguishing the holding of *Johnson* where the district court expressly reserves its ruling on a motion for directed verdict and allows the case to go to the jury with the intention of ruling on the motion subsequent to return of the verdict); *Warkentien v. Vondracek*, 633 F.2d 1 (6th Cir. 1980).

As the Seventh Circuit recognized in *Shaw, supra*, a sound basis exists for limiting the holding of *Johnson* to the specific issue there presented:

> " . . . [T]he rule [Rule 50, Fed. R. Civ. P.] does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between two alternatives. See Berry v. United States, 312 U.S. [450] 452, 453, 61 S.Ct. 637, 85 L.Ed. 945. And he can exercise this discretion with a free personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."

249 F.2d at 437-438 (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S., 212, 215-216 (1947)).

There is another compelling reason why the Sixth Circuit's decision must be upheld under the facts here presented. Rule 50(b) provides that "[n]ot later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict *and any judgment entered thereon* set aside . . . " (emphasis added). The term "judgment" as referred to in Rule 50 and defined in Rule 58, Fed. R. Civ. P., means a *final* judgment. *E.g., O. Hommel Company v. Ferro Corp., 659 F.2d 340, 353 (3d Cir. 1981), cert. denied*, 455 U.S. 1017, *reh'g denied*, 456 U.S. 965 (1982); *Philhall Corp. v. United States*, 546 F.2d 210 (6th Cir. 1976). In this case, a final, appealable judgment was not entered until July 24, 1984 *and that judgment was in favor of Respondent.* No purpose would be served to require Respondent to move for judgment n.o.v. following entry of this judgment.

Petitioner also asserts that "the Court of Appeals for the Sixth Circuit erred when they affirmed the decision of the United States District Court for the Eastern District of Kentucky, Pikeville Division, since judgment n.o.v. was entered by that court on a ground that was not included in a prior motion for directed verdict." (Petition, p. 18-19). This assertion is incorrect. The application of 12 U.S.C. § 1823(e) was specifically addressed by counsel for Respondent before the case was submitted to the jury (R. 3-2 to 3-10). With respect to this issue the Sixth Circuit stated "[d]efense counsel had been alerted to the argument that § 1823(e) may have been an obstacle to one of its defenses since the plaintiff moved for a directed

verdict on that ground at the close of all the proofs in the case."

III. The Sixth Circuit correctly applied 12 U.S.C. § 1823(e) in affirming the district court's judgment.

Petitioner asserted at trial that, since he was not present at the meeting occurring in June, 1980, he did not consent to the transfer of the collateral securing his in debtedness. Therefore, he argued that the transaction constituted a novation as to him. Both the district court and the court of appeals specifically rejected this argument. With respect to this issue the court of appeals stated:

> The *written agreement* between the bank, Taylor, Bluston Mining, and the Kincers *expressly preserves* the original parties' liability on the note. It is only by virtue of the claimed side agreement between the bank and the Kincers that the jury could have found that the assumption was intended to extinguish the liability of the original parties. Under § 1823(e), such an unwritten agreement is not valid against the F.D.I.C., since it diminishes the rights of the F.D.I.C. to the assets represented by the loan agreement. *Dixon's argument that the second loan constitutes a novation is without merit.* The language of the loan agreement states that it does not extinguish the original debtors' liability, thus it cannot be a novation. To show that the second agreement did extinguish the original liability, Dixon must interpose the side agreement between the bank and the Kincers. Section 1823(e) does not allow that unwritten

> agreement to be enforced against the F.D.I.C. (Emphasis added).

At trial, Petitioner was able to avoid entry of a directed verdict *only* by virtue of the defense of fraud raised by his co-defendants. This was based on the district court's reasoning that a release of the Kincer defendants due to fraud would also release the Petitioner, at least in part. Thus, in order for Petitioner to have prevailed at trial, the secret side agreement was a necessity. Simply stated, in order to avoid his liability under the original note, Petitioner was forced to rely on the Kincer's defense of fraud.

Petitioner also asserts that the written agreement between the bank, Taylor, Bluston Mining Company, and the Kincers met each of the four elements of 12 U.S.C. § 1823(e), and, therefore, could be used to "diminish or defeat the rights of the FDIC." This assertion is without factual basis. Due to the fact that Petitioner consented, in advance, to a transfer of the collateral in issue, the assertion is, in any case, of no consequence. KRS 355.3-606.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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APPENDIX

RULES AND STATUTORY PROVISIONS

Fed. R. Civ. P. 50(b):

> **Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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Fed. R. Civ. P. 58:

ENTRY OF JUDGMENT

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain of costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Sup. Ct. R. 17.1:

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Title 12, United States Code, Section 1823(e):

> **Agreements against interests of Corporation.** No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Kentucky Revised Statute, 355.3-606:

Impairment of Recourse or of Collateral

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.